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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/519,156	12/17/2004	Kathleen Kurschner	3075-005	6599

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EXAMINER	
PEARSE, ADEPEJU OMOLOLA	
ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 03/09/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/519,156	KURSCHNER ET AL.	
	Examiner	Art Unit	
	Adepeju Pearse	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-10* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-10* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☒ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Objections

Based on the amendment to the claims of 12/17/2004, it is assumed that claims 9-11 as originally filed are cancelled. In addition new claims 9-10 have been renumbered under Rule 37 CFR 1.126 as claims 12 and 13 respectively.

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.
>
> (e) The invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

2. Claims 1-3, 5, 7, and 12-13 are rejected under 35 U.S.C. 102(b) as being anticipated by Matsunaga (U.S. Pat. No. 3,901,983). With regard to claim 1, Matsunaga discloses a dry extract obtained from dry heated peanuts (col 2 lines 16-20, col 3 line 52). It is inherent that dry heating incorporates roasting because it is a form of dry heating.

3. With regard to claims 2 and 10, Matsunaga discloses peanuts as a source of the dry extract (abstract).

4. With regard to claim 3, Matsunaga discloses extracting the peanut and spray drying to obtain a free-flowing powder (col 3 lines 31-52).

5. With regard to claim 5, Matsunaga discloses that the peanut flour obtained can be added to products such as water-based drinks and milk to enhance their nutritive value and impart flavor (col 3 line 1-7). It is inherent that the addition this flour will also impart color because it is well known in the art that peanuts are brownish in appearance.

6. With regard to claim 7, Matsunaga discloses that the peanut flour obtained can be used as a food supplement (col 4 lines 19-21).

7. With regard to claim 9, this is a product-by-process limitation. Matsunaga discloses that the peanut flour obtained can be added to various drinks such as milk and water-based drinks to form highly concentrated foods (col 3 lines 1-5).

"Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985)

8. Claims 1-5, 7-8 and 12-13 are rejected under 35 U.S.C. 102(e) as being anticipated by Khatchatrian et al (WO 01/53418). With regard to claim 1, Khatchatrian et al disclose a dry extract obtained from dried walnut rinds (page 2 lines 3-4), in addition Khatchatrian et al disclose that any method of drying known in the art may be employed (page 3 lines 24-25). It is inherent that drying as disclosed by Khatchatrian et al incorporates roasting, because it is a form of dry heating.

9. With regard to claim 2, Khatchatrian et al disclose walnut, which is a hard-shelled fruit.

10. With regard to claim 3, Khatchatrian et al disclose subjecting the grounded walnut rinds to a water extraction. The liquid extract is exposed to spray drying to produce a powder product (page 2 lines 17-19, page 3 lines 1-3).

11. With regard to claim 4, Khatchatrian et al disclose carrying out the extraction in stages (page 3 lines 31-32).

12. With regard to claims 5 and 7, Khatchatrian et al disclose that the resulting powder obtained may be used as a dye for foodstuffs, cosmetics and hair color products (page 4 lines 26-29).

13. With regard to claim 8, Khatchatrian et al is silent as to applying the dry extract to form a film. However, Khatchatrian et al discloses that the dye material produced may be used to color confectionery products such as cakes or ice creams. It is inherent that the dye application forms a coating or film on the product by coloring it.

14. With regard to claim 12, this is a product-by-process limitation. Khatchatrian et al disclose that the resulting powder obtained may be used as a dye for foodstuffs.

"Even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process." In re Thorpe, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985)

9. With regard to claim 13, Khatchatrian et al disclose walnuts as a suitable source.

Claim Rejections - 35 USC § 103

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

16. The factual inquiries set forth in *Graham* v. *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

17. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

18. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over Khatchatrian et al in view of Fox (U.S. Pat. No. 6,132,791). Khatchatrian et al disclose that the resulting powder obtained may be used as a dye for foodstuffs but failed to disclose stabilizing anthocyanins. Fox teaches that it is well known in the art that food products including wine contain anthocyanins as

natural colorants. It would be obvious to one of ordinary skill in the art to expect that adding the dye taught by Khatchatrian et al into these food products will stabilize the anthocyanins as instantly claimed.

Conclusion

19. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Prior art discloses applicable subject matter.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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